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Matter of: Canadian Commercial Corporation/ Liftking Industries, Inc.

File: B-282334; B-282334.2; B-282334.3

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DIGEST

1. Solicitation language that stated that the agency intended to make up to two awards allowed the agency the discretion to make a single award; it did not state a requirement for multiple awards.

2 The agency reasonably determined that a single award was in the best interest of the government where the agency reasonably evaluated the awardee's offer as substantially superior to the protester's offer such that award to the awardee alone was in the government's best interests.

3. General Accounting Office will not review an agency's determination to waive Buy American Act preference requirements as being in the public interest; late approval of the waiver does not provide a basis to object to the agency's source selection decision which presumed the waiver of the Buy American Act requirements would be obtained.

DECISION

Canadian Commercial Corporation, on behalf of Liftking Industries, Inc., protests the award of a contract to Kalmar Last Maskin Verkstad under request for proposals (RFP) No. DAAE07-98-R-S011, issued by the U. S. Army Tank-Automotive and Armaments Command (TACOM), for two prototype rough terrain container handlers (RTCH).

We deny the protest.

An RTCH is a vehicle that lifts, moves, and stacks 20-foot and 40-foot long containers up to a stated load weight. Agency Report (AR), Tab 7, Operational Requirements Document (ORD), at 1, and Tab 11, Source Selection Plan (SSP), at 5. The Army's current RTCHs were fielded between 1979 and 1984, and no longer fully meet the agency's needs with regard to efficiency, economy, and lift capability. In addition, the current RTCHs require labor- and equipment-intensive disassembly for transportation. AR, Tab 7, ORD, at 2.

The Army developed a two-phased acquisition strategy to obtain the new RTCHs. AR, Tab 11, SSP, at 5-6, and Tab 17, RFP, at 20. In phase 1, up to two demonstration contracts were to be let, after full and open competition, for prototype RTCHs for testing. The Army hoped to award one contract for a mast-type RTCH (which is the type of RTCH currently used by the agency) and another contract for an alternative technology type RTCH. Award of a production contract for the RTCHs would be made in phase 2. Offerors were informed that the agency might acquire between 394 and 500 RTCHs during phase 2, depending upon available funding. AR, Tab 17, RFP, at 20. The competition for the production contract would be limited to the contractors who received prototype demonstration contracts under phase 1.¹ Id.

The Army conducted a number of market surveys and obtained industry comments on a draft purchase description (PD) and draft RFP. AR, Tab 1, Contracting Officer's Statement, at 1-2. The PD and RFP were drafted to allow a variety of design types to compete for award. Id. From its market surveys, the agency expected proposals offering RTCHs using a fixed mast, which is an older, proven technology, and RTCHs using an extendable overhead boom (also called reach stackers), which is based upon newer technology.² Id. at 2.

¹A justification for other than full and open competition was prepared for phase 2, limiting the competition to the contractors that received awards under phase 1. AR, Tab 54.

²Manufacturers of other technology types also expressed interest; however, proposals were received only from manufacturers offering either the mast-type or boom-type (reach stacker) RTCH. AR, Tab 1, Contracting Officer's Statement, at 2.

The Army implemented phase 1 of its acquisition plan by issuing the RFP on August 24, 1998. The RFP provided for the award of up to two fixed-price contracts for the prototype RTCHs and for training and support services. Specifically, offerors were informed as follows:

The government intends to award up to two contracts for up to two technologies, to up to two responsible offerors whose proposals, in the Source Selection Authority's [SSA] opinion, represent the best value to the government, based upon the criteria set forth in this Section M. The government intends to award one contract for the best value mast type (as defined in ASME B56.6) container handler and another contract for the best value alternative technology container handler. However, we reserve the right to make awards based on the two best proposals.

AR, Tab 17, RFP, § M.2, at 93. Offerors were also informed that the agency had approximately \$3 million available to fund two prototype contracts. Id. at 19. Delivery of the prototype RTCHs was required within 210 days of contract award. Id. § F.5 at 45.

The RFP's PD stated the minimum essential performance and design capabilities that the RTCH's must meet. AR, Tab 17, RFP, at 100-56. Among other things, the RTCH must be capable of lifting loads of up to a gross weight of 53,000 pounds, while operating on a variety of surfaces, including sandy, snowy or muddy surfaces. AR, Tab 17, RFP, at 100, 106. Also, requirements were provided for the quick disconnection of hydraulic, electrical, heater, fuel, oil, air conditioning, and air lines to allow for transport disassembly. Id. at 114, 115. Offerors were informed that proposals must meet all required performance levels.

The following evaluation criteria and subcriteria were identified in RFP § M.3:

1. TECHNICAL
a. Transportability
b. Mobility and Related Items
c. Container Handling
d. Schedule Risk and Test Support
2. LOGISTICS
a. Technical Manuals
b. Logistics Support
3. PRODUCTION ESTIMATE³

³Under the production estimate subcriterion, the agency assessed the offeror's proposed estimate for production vehicles to determine whether the offeror would
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4. PAST PERFORMANCE/SMALL BUSINESS
a. Performance History
b. Small Business Participation
5. PRICE

The technical criterion was stated to be more important than any other single criterion and to be almost as important as all other criteria combined. The second most important criterion, logistics, was stated to be significantly more important than the production estimate criterion, which was stated to be more important than the past performance/small business criterion, which in turn was more important than price. AR, Tab 17, RFP, § M.3.b.1, at 93.

The RFP also identified, under the first three subcriteria of the technical criterion, desired characteristics that offerors could propose to satisfy. AR, Tab 17, RFP, § M.4.b.1, at 94-95. For example, under the transportability subcriterion the RFP required that RTCHs be capable of disassembly for air transportation within 14 hours but expressed a desire for disassembly within 4 hours.⁴ *Id.* at 95 Offerors were informed that the agency would assess the extent to which the offeror proposed to meet the desired characteristic, the relative importance of the desired characteristic, and the risk of the offeror not being able to meet what the offeror proposed. *Id.* at 94.

The RFP incorporated by reference Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7001, which implements the Buy American Act, 41 U.S.C. § 10a-10d (1994), and provides for the addition of an evaluation differential to offerors proposing to furnish foreign end products when they are in competition with offers of domestic end products. AR, Tab 17, RFP, § H, at 47. The differential to be applied to a nonqualifying country end product is 50 percent of the offered price inclusive of duty. DFARS § 252.225-7001(d).

The RFP provided detailed proposal preparation instructions for each evaluation criterion and subcriterion. AR, Tab 17, RFP, § L, at 76-91. Offerors were informed that certain portions of their proposals would only be presented orally. For example, offerors were directed to provide a written response to the first three subcriteria within the technical criterion, but to address the schedule risk and test

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be able to offer a price for the production vehicle in phase 2 that was affordable and reasonable. AR, Tab 17, RFP, § M.6, at 96. Offerors were informed that the government's target average price for production units was \$500,000 per unit. AR, Tab 17, RFP, Executive Summary, at 19.

⁴The RFP similarly provided required and desired disassembly time requirements for highway, rail, and sea transportation. AR, Tab 17, RFP, § M.4.b.1, at 94-95.

support subcriterion only during an oral presentation. *Id.* § L.20, at 82, 85. Specific instructions for the preparation of oral presentation were also provided. *Id.* § L.25, at 91-92.

Five proposals, including those of Liftking (a Canadian firm) and Kalmar (a Swedish firm), were received in response to the RFP.⁵ Oral presentations were made, discussions conducted, and final proposal revisions (FPR) received. Kalmar's and Liftking's FPRs were evaluated as follows:

Criteria	Kalmar	Liftking
Technical ⁶	Good/Low Risk	Adequate/Moderate Risk
Logistics	Excellent/Very Low Risk	Adequate/Moderate Risk
Production Estimate	[DELETED] Reasonable/Realistic	[DELETED] Reasonable/Realistic
Past Performance/Small Business	Good/Low Risk	Marginal/High Risk
Price	[DELETED]	[DELETED]

AR, Tab 45, SSA Briefing, at 6, 40.

Kalmar proposed to modify its commercial boom-type (reach stacker) container handler to satisfy the PD requirements. AR, Tab 37, Source Selection Evaluation Board (SSEB) Technical Criterion Worksheet for Kalmar, at 1. The good/low risk rating Kalmar's proposal received under technical, the most important criterion, reflected the SSEB's assessment that Kalmar had offered significant technical advantages and improvements that would translate into improved flexibility for both military planners and operators. *Id.* at 5. Among other things, Kalmar had proposed a design that would not require disassembly for transportability; this was viewed as a major advantage that allowed Kalmar to propose to exceed to the maximum extent all desired characteristics for transportability. *Id.* at 4. The evaluators noted that the

⁵Ultimately, only three proposals were evaluated for award; of the other two proposals initially received, one was rejected as incomplete and the other was withdrawn.

⁶Both Kalmar's and Liftking's offers were assessed as good/low risk under the technical criterion for their respective offers to meet desired characteristics. AR, Tab 45, SSA Briefing, at 6. Under the transportability subcriterion, Kalmar was assessed as excellent/very low risk for its offer to exceed all desired transportability characteristics, while Liftking was assessed as good/low risk for offering to meet most desired characteristics. AR, Tab 37, SSEB Technical Criterion Worksheet for Kalmar, at 2 and Tab 29, SSEB Technical Criterion Worksheet for Liftking, at 12-13.

“single major drawback” associated with Kalmar’s proposed increased capabilities is that these capabilities had never before been built into a single vehicle; the evaluators concluded, however, that although unknown problems may exist, this disadvantage was outweighed by the number and magnitude of technological advantages offered by Kalmar’s product. Id. at 5.

Kalmar’s excellent/very low risk rating under logistics, the second most important criterion, reflected the SSEB’s assessment that Kalmar had proposed an excellent approach to satisfying the technical manual requirements and has an excellent global support network that should provide good parts support, including to users in isolated areas. AR, Tab 38, SSEB Logistics Criterion Worksheet for Kalmar, at 3. The evaluators positively noted Kalmar’s current use of electronic data interchange to process parts orders and detailed plan for direct vendor delivery. Id.

Liftking proposed to modify its existing mast-type RTCH.⁷ AR, Tab 29, SSEB Technical Criterion Worksheet for Liftking, at 1. Liftking’s adequate/moderate risk rating under the technical criterion reflected the SSEB’s concern that, although Liftking had proposed a sound approach that was capable of meeting the PD requirements, its proposed design presented a number of disadvantages, including the requirement for disassembly to allow for transportation. Id. at 1-2; AR, Tab 45, SSA Briefing Charts, at 9. In addition, the evaluators were concerned with Liftking’s understanding and compliance with military standard tiedown requirements, which affected the transportability of the offeror’s proposed RTCH.⁸ The evaluators also noted a number of disadvantages with regard to container handling in Liftking’s design. Specifically, the evaluators noted that the firm had not yet finalized the design of their hydraulic system and tophandler, but believed that Liftking’s approach was feasible and practicable.⁹ In addition, the evaluators were concerned that emergency manual lowering of a load must be controlled from outside the operator cab and would require at least two people. AR, Tab 29, SSEB Technical Criterion Worksheet for Liftking, at 22.

⁷The other offeror also offered a mast-type RCTH.

⁸Tiedowns are the locations on the RTCH where restraints are attached for transporting RTCHs by railcar, trailer, aircraft, or watercraft. The current military standard provides for four tiedown locations. The agency states that there are limited tiedown devices on ships and railcars, and therefore military equipment must be capable of being adequately restrained with only four tiedown provisions, and military personnel are trained to plan for and to use only four tiedown provisions. Supplemental Contracting Officer’s Statement at 27.

⁹The tophandler is the adjustable device that attaches to the mast or boom to pick up containers.

Liftking's FPR was evaluated as adequate/moderate risk under logistics, the second most important criterion. AR, Tab 45, SSA Briefing Charts, at 6. The SSEB noted that the firm demonstrated a general understanding of the government's requirements for the written technical manual and appeared capable of delivering manuals by the vehicle hand-off date of June 30, 2001. AR, Tab 30, SSEB Logistics Criterion Worksheet for Liftking, at 3. Nevertheless, the evaluators were concerned that Liftking intended to perform the work inhouse, rather than using an experienced subcontractor, and intended to hire college students to perform parts of the manual development. Id. at 7-8. Also, the SSEB was concerned that Liftking's intended schedule did not allot a realistic time for technical manual development. Id. With regard to logistics support, the SSEB found that Liftking could provide global support through a dealer network but that the firm was not electronically connected to its vendors. Id. at 12. Although Liftking stated that it planned to be electronically connected by 2001, it did not offer a specific plan to do so. This, the evaluators concluded, would negatively affect the government's plan for direct vendor delivery, which would be provided through a transparent system that used electronic data interchange to route orders from the user to the supplier shipment. Id. at 13.

The SSEB's evaluation results were presented to the SSA, who adopted them as his own. AR, Tab 46, Source Selection Decision, at 2-4. The SSA concluded that Kalmar's proposal offered the best value to the government. Id. at 4. Specifically, the SSA noted that Kalmar's proposal was the highest rated under the two most important evaluation criteria—technical and logistics—as well as the past performance criterion, which the SSA stated “tells me the Government has little risk of not getting what Kalmar is proposing.” Id. Among a number of strengths noted by the SSA, the SSA found particularly significant the fact that Kalmar's proposed design did not require disassembly for transportation, as well as the container handling capability of Kalmar's proposed RTCH, which was the only one that could stack nine and one-half foot containers three high, which the SSA noted provides greater flexibility in marshalling areas and using available ground space. Id. at 4-5. The SSA also recognized that, although Kalmar's production estimate was higher than that of the other offerors, Kalmar's unit price estimate was reasonable, well supported, and within the government target: “I believe the Government would be more than willing to pay [Kalmar's] estimated price for a vehicle that offers so many advantages.” Id. at 5.

Regarding Liftking's proposal, the SSA concluded that Liftking had a credible proposal, offering some advantages. However, the SSA noted a number of disadvantages in Liftking's offer:

[Liftking has] not finalized their tophandler design raising some question about [Liftking's] ability to meet the container handler requirements and prototype delivery schedule. Most significantly, Liftking does not demonstrate a good understanding of the manuals

requirement and there is concern over their ability to support the vehicle once fielded. Over 90% of the parts of their vehicle are supplied by vendors to whom they are not electronically linked nor do they have a well defined plan to do so. Additionally, [Liftking's] performance history shows a record of late delivery of both prototypes and manuals. Liftking offers no advantages over Kalmar in the Technical area and their apparent lack of understanding of the manual process and concerns about their ability to support the vehicle, as well as their performance history, lead me to conclude that award to Liftking is not in the best interests of the Government.

Id. at 5.

The SSA determined that despite the agency's original intent to award two contracts for the phase 1 testing of the RTCH, it was not in the government's best interest "to spend the money to take either of the other two offerors [other than Kalmar] through Phase 1." Id. Specifically, the SSA stated:

Considering Kalmar's across the board strengths and the relevance of these strengths to the Phase II selection criteria, neither other offer has a reasonable chance of winning the Phase II production contract. It would not be responsible for TACOM to cause either other offeror to expend resources necessary for the completion of Phase I and the preparation of a Phase II proposal, nor would it be a prudent use of Government funds.

Id. at 6. Accordingly, only the offer of Kalmar was selected for award. Liftking was notified of award, and this protest followed.

Liftking complains that selecting only Kalmar's proposal for award was inconsistent with the stated intent of the RFP, which provided for multiple awards. Protest at 5. Liftking argues that making only a single award represented a change in the agency's requirements for which offerors were not given notice or an opportunity to respond. Liftking also complains that the agency should have informed offerors that only the boom-type technology would meet its needs. Id. at 5-6.

In response, the agency notes that the RFP merely permitted, but did not mandate, the award of multiple contracts. AR, Tab 2, Legal Memorandum, at 11. The agency admits that its expectation had been that multiple awards would be made under the RFP to offers for a mast-type and boom-type RTCHs. AR, Tab 1, Contracting Officer's Statement, at 19. Nevertheless, the agency states that Kalmar's proposal for a boom-type RTCH was so superior to Liftking's and the other offeror's proposals that neither Liftking nor the other offeror had a reasonable chance of winning a phase 2 award. Id.

We agree with the agency that the RFP did not require multiple awards. Although it is certainly true that the solicitation expressed the agency's intention to award up to two prototype contracts under the RFP, this expression of intent cannot reasonably be read as stating a legal requirement for multiple awards. Rather, the agency's expressions of intent merely signified the agency's expectations and did not themselves create a legal obligation to award two contracts. See McNeil Techs., Inc., B-278904.2, Apr. 2, 1998, 98-1 CPD ¶ 96 at 5 (solicitation language that agency contemplates or anticipates making award to a particular type of firm does not state a legal obligation but merely states the agency's expectation). Given the discretion retained by the agency to make up to two awards, we conclude that offerors could not have been reasonably misled, as Liftking argues, into believing that two awards would be made under all circumstances.

We also find that the agency had not pre-determined that it would make award to a boom-type RTCH, as Liftking suggests. Rather, the record supports the agency's statement that in finalizing its acquisition strategy the agency was unsure whether any technology other than the mast-type RTCH could meet its needs. For example, a June 15, 1998 in-process review briefing on the RTCH program shows that, prior to the issuance of the RFP, the agency made significant efforts to determine the technology available to meet the agency's needs. AR, Tab 13, Special In-Process Review for the RTCH Program, at 25; see also Tabs 4 (market survey), 5 (Commerce Business Daily notice), 6 (market survey), 8 (Commerce Business Daily notice), and 9 (market survey). As reflected in this pre-solicitation briefing, the agency had determined that mast-type technology appeared to be lower risk and lower cost than other alternative technology, such as that offered by the boom-type RTCH. AR, Tab 13, Special In-Process Review for the RTCH Program, at 31. Similarly, in another pre-solicitation document, the agency noted that it considered mast-type RTCHs to be low risk because they use proven technology while reach stackers were considered moderately risky because "there are no existing rough terrain reach stackers" and that the potential for cost growth for reach stackers was high. AR, Tab 14, June 17, 1998 E-Mail from the Assistant Product Manager to the Army Deputy for Systems Acquisition. There is simply nothing in the record that contradicts the agency's statement that it was surprised by the technical excellence and low production estimate (anticipated unit pricing) of Kalmar's proposal.

Liftking also complains that awarding only one prototype contract was unreasonable under the circumstances presented here. In this regard, Liftking challenges the agency's evaluation of its and Kalmar's proposal. Liftking also contends that, even accepting the agency's evaluation results, by making only one award:

the Army is subjecting itself to the heightened risk--antithetical to the purpose of the procurement in the first place--that will have only a boom-type RTCH prototype for testing, a vehicle which uses a technology never before adapted for ruggedized, militarized use. The Kalmar unit may not successfully pass the testing requirements, and

the Army may then be compelled to reject the Kalmar RTCH or to relax previously-mandatory specification requirements for the sole benefit of Kalmar and to the prejudice of other offerors.

Protester's Final Comments, June 10, 1999, at 2.

In reviewing protests of allegedly improper evaluations and source selection decisions, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. A protester's mere disagreement with an agency's judgment does not render it unreasonable. Brunswick Defense, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225 at 9.

Here, we find from our review of the record that the agency's evaluation of the firms' proposals was reasonable. The agency's evaluation is supported by contemporaneous documentation that details the agency's judgments under each evaluation criterion and subcriterion. AR, Tabs 29-44, SSEB Evaluation Records, and Tab 45, SSA Briefing Charts. In addition, the contracting officer has provided a detailed post-protest explanation, which is consistent with the contemporaneous evaluation record. As explained below, Liftking references only selected portions of the evaluation record in an effort to undermine the agency's evaluation conclusions. While Liftking's arguments demonstrate its disagreement with the agency's judgment, it does not show that the evaluation was unreasonable.

For example, under the transportability subcriterion, which was the most important subcriterion under technical, the most important criterion, Liftking complains that Kalmar's proposal was assessed as good/low risk, while Liftking's proposal was assessed as adequate/moderate risk, even though both proposals were noted to have proposed too many tiedowns for transportation of the RTCHs. Protester's Comments at 17-18. Liftking contends that the evaluators' concerns with Liftking's plan for tiedowns did not justify an adequate/moderate risk rating under this factor. Protest at 8. Liftking also questions Kalmar's higher rating under this criterion, where the evaluators noted that Kalmar proposed the use of spreader bars to lift the vehicle and that Kalmar's RTCH would have an extensive overhang when loaded on a military trailer. Protester's Comments at 19.

It is true that the agency cited as a proposal disadvantage both Kalmar's and Liftking's proposed number of tiedowns for transportation of their RTCH. AR, Tab 45, SSA Briefing Charts, at 9. It is also true that the SSEB cited as a moderate design risk Kalmar's proposed use of spreader bars and noted that in "a few states, in certain circumstances" Kalmar may need to remove its top handler due to excessive overhang. AR, Tab 37, SSEB Technical Criterion Worksheet for Kalmar, at 8-9. Nevertheless, Liftking's protest arguments ignore the remainder of the evaluation record that explains the agency's ultimate evaluation judgment with respect to the transportability subcriterion. Regarding the firms' tiedown provisions, the agency found that Liftking not only proposed too many tiedowns for highway, rail, and air

transportation, but, more importantly, had failed to demonstrate a clear understanding of the current military standard requirements for tiedowns. AR, Tab 29, SSEB Technical Criterion Worksheet for Liftking, at 10-12. Kalmar, on the other hand, was found to propose too many tiedowns in only the rail transport mode, but had proposed the appropriate number of tiedowns for highway, marine and air transport. AR, Tab 37, at 8. Also, significantly and in contrast to Liftking, Kalmar demonstrated its knowledge and understanding of the current military standard governing tiedowns and transportation. Id.

With respect to Kalmar's proposed use of spread bars and Liftking's allegations regarding the overhang of Kalmar's RTCH when loaded on a military trailer,¹⁰ these disadvantages were specifically recognized by the SSEB in its evaluation. AR, Tab 37, SSEB Technical Criterion Worksheet for Kalmar, at 10. The evaluators weighed these disadvantages and Kalmar's proposal of too many tiedown points for rail transport against the significant advantages offered by Kalmar's design, which required no disassembly for transportation. The evaluators concluded that taken together the significant advantages outweighed the disadvantages evaluated in Kalmar's proposal. We find no basis in this record to question the agency's evaluation judgment.

Similarly, with respect to the container handling subcriterion of the technical criterion, Liftking objects to its adequate/moderate risk rating as opposed to Kalmar's excellent/low risk rating as "an unfair apple/oranges comparison because a mast-type RTCH does not operate the same way as a boom-type RTCH, but TACOM never stated in the RFP or elsewhere that it preferred boom-type technology." Protester's Comments at 20. In addition to ignoring the evaluation record, this argument reflects a fundamental misunderstanding of the solicitation requirements and evaluation scheme. The RFP allowed offerors to propose any technology type of RTCH, which was to be evaluated against various design and performance requirements. Here, Liftking's proposed RCTH was downgraded under the container handling subcriterion because its tophandler and hydraulic system design had not yet been finalized and were not adequately addressed in Liftking's proposal. AR, Tab 29, SSEB Technical Criterion Worksheet for Liftking, at 22, 23. Liftking does not show this judgment to be unreasonable.¹¹ Kalmar's proposal was found under this

¹⁰The agency states that whatever disadvantage is associated with Kalmar's proposal with respect to overhang when loaded on a military trailer (and the evaluation record indicates that this would be a problem only in a "few states, in certain circumstances") was clearly outweighed by the fact that Kalmar's RTCH could be loaded on a single trailer. AR, Tab 37, SSEB Technical Criterion Worksheet for Kalmar, at 9; Supplemental Contracting Officer's Statement at 28.

¹¹Liftking originally asserted that the agency's judgment in this regard was unreasonable because this proposal was for the award of a prototype contract and that Liftking would finalize its design after award. Protest at 8. The agency rebutted
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subcriterion to reflect an excellent approach that would clearly satisfy all requirements and which offered numerous substantive advantages and no disadvantages. AR, Tab 37, SSEB Technical Criterion Worksheet for Kalmar, at 21. Liftking does not dispute these findings or conclusions regarding Kalmar's proposal under the container handling subcriterion.

As another example, Liftking protests its adequate/moderate risk rating under logistics, the second most important criterion, complaining that agency criticisms of its plan to produce the written technical manual in-house and of its failure to have an electronic data interchange parts supply system were unfair.

Regarding its plan to produce the written technical manual in-house, Liftking argues that upon receiving award Liftking could have changed its in-house approach and subcontracted the written technical manual to an experienced vendor, as Liftking proposed to do with the required electronic-format manuals. While it is certainly true that Liftking could have proposed a different approach to producing the written technical manual, the agency was required to evaluate what Liftking actually offered. Here, the agency assessed Liftking's proposed approach to preparing the technical manual as a moderate risk because it found that Liftking underestimated the amount of time required for development of the manual and proposed to produce the work in-house without sufficient personnel. AR, Tab 30, SSEB Logistics Criterion Worksheet for Liftking, at 7-8. While Liftking disagrees with the agency's judgment, it has not shown it to be unreasonable.

Regarding its failure to have an electronic data interchange parts supply system, Liftking contends that this should not have been assessed as a disadvantage because Liftking offered to provide an electronic data interchange system in 2001 and because the phase 1 award was a development effort for which the electronic data interchange system would not be necessary. Protester's Comments at 21. This argument ignores, however, the evaluators' concerns that Liftking offered no specific plan for implementing an electronic data interchange system. AR, Tab 30, SSEB's Logistics Criterion Worksheet for Liftking, at 12-14.

Liftking also argues that Kalmar's proposal did not satisfy the mandatory RFP requirement for roll-over protective structure (ROPS) and falling objects protective structure (FOPS). Protester's Comments at 9. This protest allegation is based upon the fact that Liftking's mast-type design employed a steel structure around the operator's cab to satisfy this requirement, while Kalmar's boom-type design did not. The protester also cites a portion of the evaluation record where the SSEB

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this argument in its agency report, AR, Tab 1, Contracting Officer's Statement, at 7, and Liftking failed to reply to that rebuttal in its comments.

commented that in Kalmar's design the cab would be crushed by the boom in the event of a catastrophic failure of both boom hoist cylinders or attachment points.

A complete reading of the record does not support the protester's arguments. The evaluators found that the boom-over-cab design offered by Kalmar satisfied the ROPS/FOPS requirements without the need for a steel structure, which Liftking's different design required. AR, Tab 37, SSEB Technical Criterion Worksheet, at 16. It is true that the evaluators stated that in the boom-over-cab design the cab could be crushed in the "remote event of catastrophic simultaneous failures of both boom hoist cylinders or attachment points." *Id.* The evaluators noted that Kalmar recognized this potential problem and had designed affected areas to mitigate any possible problem. *Id.* Liftking does not assert that the evaluators' judgment in this regard was unreasonable.

In sum, we find that the evaluation record supports the reasonableness of the SSEB evaluation conclusions regarding Kalmar's and Liftking's proposals.¹²

We also do not agree with Liftking that the SSA's decision to award only one phase 1 contract to Kalmar was unreasonable or too risky. As noted above, the SSA prepared a detailed source selection decision that explained the basis of his decision to award one contract to Kalmar. AR, Tab 46, Source Selection Decision. This document demonstrates that the SSA was well aware of the evaluated advantages and disadvantages in the firms' offers. It also shows that the SSA knew that selecting only Kalmar's offer for award represented a change in the agency's acquisition strategy for the RCTH program. *Id.* at 4. The SSA explained in his decision how he determined that Kalmar's proposal was not only the "best overall" but was the only one that had a reasonable chance of winning the phase 2 production contract when the relevance of Kalmar's "across the board strengths" were considered. *Id.* at 4-6. The SSA also specifically noted why he believed that award to Kalmar alone would not be too risky, given Kalmar's high evaluation ratings under the technical, logistics, and past performance criteria. *Id.* at 4. While Liftking disagrees with the SSA's judgment, it has not shown it to be unreasonable or erroneous in any regard.

Liftking also complains that at the time of award the agency had neither applied the Buy American Act evaluation preference, which required the application of the 50-percent price evaluation factor to Kalmar's offer, nor waived the Buy American

¹²Liftking also complains that the agency employed an undisclosed minimum scoring scheme to determine that Liftking should not receive award under the RFP. Supplemental Protest, May 28, 1999, at 2-3. There is absolutely no evidence in the record supporting this allegation. As explained in the agency's evaluation record and source selection decision, Kalmar received award based upon the agency's conclusion that it had submitted a far superior proposal and not based upon an evaluation scheme that required offers to satisfy an established minimum score.

Act requirements. Liftking also complains that waiver of the Buy American Act requirements is not appropriate here.

Acquisitions for products from Sweden may, on a purchase-by-purchase basis, be exempted from application of the Buy American Act as inconsistent with the public interest. DFARS § 225-872-1(b). It is true that the agency waived the application of the Act to Kalmar's offer only after Liftking filed its protest. The Assistant Secretary of the Army (Acquisition, Logistics and Technology) determined that, consistent with the memorandum of understanding between the United States and Sweden to remove barriers to procurement for defense equipment produced in each other's countries, applying the restrictions of the Buy American Act to Kalmar's proposal in this procurement was inconsistent with the public interest. AR, Tab 61.

Liftking states that it does not question "the Assistant Secretary's authority and discretion whether to issue a waiver here, but rather complains that the waiver itself is legally insufficient." Protester's Final Comments at 4. Liftking's arguments are based upon its own reading of the memorandum of understanding between the United States and Sweden and its allegations of evaluation errors.

The decision to waive the Buy American Act provisions in a particular procurement "involves balancing competing Buy American and foreign policies to determine what is in the public interest," which we will not review. SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30 at 5. Although we agree with Liftking that the agency should have processed the Buy American Act waiver prior to award of the contract, we do not find that the late waiver of the Act's requirements provides us with a basis to disturb the agency's procurement here. The fact remains that the agency's evaluation and selection of Kalmar's offer presumed the waiver of the Buy American Act evaluation preference and that ultimately the Assistant Secretary of the Army determined that waiver was appropriate.

Finally, Liftking's complains that making a single award to Kalmar would result in an unjustified sole-source award to Kalmar in phase 2. Protests that merely anticipate improper agency action are speculative and premature and will not be considered by our Office. Safety-Kleen Corp., B-274176, B-274176.2, Nov. 25, 1996, 96-2 CPD ¶ 200 at 6. Here, the RFP does not provide for the award of a production contract; that will be done under a separate solicitation that has yet to be issued. In this regard, the agency recognizes that its future procurement for production RTCH would require new administrative judgments and states that in the event it determined to make a sole-source award of the production contract, and prior to making such an award,

the agency would publish a new synopsis and prepare a new justification for other than full and open competition. Agency Response to Protester's Final Comments, June 7, 1999, at 5.

The protest is denied.

Comptroller General
of the United States